83-262

No. .....

IN THE

Supreme Court of the United States

October Term, 1983

CHEECHAKO LEASING COMPANY,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD
and JUNE FRED ROSE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a "final judgment" by the Courts below has been rendered for the purpose of certiorari jurisdiction of this Court.

2. Whether an Alaska Workers' Compensation Board decision, based on that state's standard of industrial causation as a prerequisite to entitlement, precludes a subsequent consideration of entitlement by the California Workers' Compensation Appeals Board under California's standard of industrial causation, by virtue of the operation of the Full Faith and Credit Clause of the United States Constitution.

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STATEMENT OF THE CASE

Petitioner's prejudicial summary of the pertinent facts of this case compels Respondent to offer the capitulation of facts.

Respondent did in fact file on August 11, 1976, in the State of California, an application for adjudication of his claim alleging an industrially induced heart attack suffered in Alaska while in the employ of a California employer, i.e., the Petitioner.

On September 30, 1976, Respondent filed a similar application with the Alaska Workers' Compensation Board relating to the same injury.

The Alaska Board heard Respondent's claim on July 4, 1979. The principal issue was indeed whether or not the heart attack was job related. On September 26, 1979, the Alaska Board, in its Preliminary Finding on Decision and Order, held against Respondent, due to the absence of evidence that the heart attack was the result in "unusual exertion."

In the California proceeding, Petitioner's motion for dismissal for want of jurisdiction under the Full Faith and Credit Clause of the United States Constitution was heard before the California Workers' Compensation Appeals Board on June 10, 1980. In its October 3, 1980, Finding on Jurisdiction, the Board noted that California had "great interest" in the matter, and further that Alaska's "unusual exertion" requirement was "much more conservative than California's," and held that it had jurisdiction to hear the case, in order to determine whether the injury was compensable under California law.

Petitioner subsequently filed a timely Petition for Reconsideration of the Board's decision. Reconsideration was granted and jurisdiction ultimately upheld by the Workers' Compensation Appeals Board in its Opinion of July 13, 1983. Relying on *Thomas V. Washington Gas Light Company*, 448 U.S. 261, 65 L. Ed. 2d 757, 100 S. Ct. 2647 (1980), the Board upheld California's jurisdiction, holding that inasmuch as the Alaska finding of unusual exertion was not a California prerequisite of compensability, Respondent's California remedies were not barred by the Full Faith and Credit Clause of the United States Constitution.

On February 23, 1983, the Court of Appeal of the State of California denied without comment Petitioner's Petition for Writ of Review. The Supreme Court of the State of California also denied without comment Petitioner's Petition for Hearing on May 19, 1983.

REASONS FOR DENYING PETITION

1. A "final judgment" has not been rendered, and certiorari jurisdiction is therefore absent.

The final judgment analysis and rule precludes review where " . . . anything further remains to be determined by the State Court, no matter how disassociated from the only Federal issue that has been finally adjudicated by the highest court in this state." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945).

In the instant case, the effect of the holding of the Supreme Court of the State of California was to uphold the Board's finding of jurisdiction to adjudicate Respondent's substantive claims to California remedies under its laws. In his Opinion on Decision filed in conjunction with Finding on Jurisdiction, the Judge stated explicitly that he was " . . . only finding California has authority and jurisdiction to hear the matter and determine whether if under California law and precedent there is a compensable injury."

This finding leaves wholly untouched the substantive merit of Respondent's claim. It might be characterized as either preliminary or interlocutory, but it clearly fails the definition of "finality" as articulated in *Radio Station WOW, Inc., supra.* Nor is it saved by any of the recognized exceptions of this test, two of which have been cited by Petitioner in its brief.

Petitioner relies on third and fourth categories of exception articulated by this Court in *Cox Broadcasting vs. Cohn*, 420 U.S. 429, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Respondent submits that Petitioner's

citation of *Cox*, and its exceptions to the finality rule is inapposite.

Cox's third category of exception, relied on by Petitioner, embraces those cases presenting each of three component parts:

1. The federal claim has been finally decided;

2. Further state proceedings on the merits are pending; and

3. Later review of the federal issue cannot be had, whatever the cases ultimate outcome may be.

This case fails to present all three component parts.

While the federal claim has been "finally decided," by virtue of the State Supreme Court's refusal to hear the Petitioner, and further state proceedings on the merits of Respondent's claim are in fact pending, it cannot be said that governing state law prevents Petitioner from presenting his federal claims for review. This Court in *Cox* cited *California v. Stuart*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) as the "epitome" of such a case:

> ". . . although the state might have prevailed at trial, we granted its Petition for Certiorari and affirmed, explaining that the state's judgment was 'final' since an acquittal of the defendant at trial would preclude, under the law, an appeal by the state."

In *California v. Stuart*, the Petitioner risked forfeiture of its appellate rights in state courts by proceeding on the merits. Petitioner's attempt to draw an analogy between his position and that of the Petitioner in *California v. Stuart* fails due to the total absence

of congruity on this key point. In the instant case, Petitioner, unlike the state in a criminal proceeding is not precluded from taking an appeal from an adverse decision. Therefore, the third category exception of *Cox* cannot appropriately be applied to this case.

Nor can it be maintained that the fourth category exception of *Cox* pertains here. This exception applies under certain specified circumstances, when ". . . a refusal *immediately* to review the State Court decision might *seriously* erode federal policy . . ." (*Cox*, *supra*, 43 L. Ed. 2d, at page 342, emphasis added).

Although Petitioner has cited in support of its Petition this exception, it has not even attempted to identify the federal policy at risk, as mandated by the Court's definition of the fourth category exception. Without articulation of such a policy, it is, of course, impossible to evaluate whether failure to *immediately* grant review risks *serious* erosion of any such policy. For this reason, the fourth exception must also fail.

Neither of the final judgment exceptions put forward by Petitioner fit the facts of this case. In the absence of any of the recognized exceptions, review of this case, for the reasons stated above, is precluded under the general final judgment rule.

2. The Full Faith and Credit Clause of the U.S. Constitution does not preclude a consideration of Respondent's claim by the California Workers' Compensation Appeals Board.

In denying Respondent Rose's application, the Alaska Workers' Compensation Appeals Board in its July and September, 1979, Decision explained that a finding of "unusual exertion" must be made in order

to characterize a heart attack as being industrially related:

> "In order to be found compensable the heart attack must be the result of unusual exertion. Barring such evidence the Board has held in the past that it is of natural causes and not job related."

California does not require such a finding as a prerequisite for compensable heart related injuries. (See *Opinion on Decision*, Honorable Alvin L. Dove, September 25, 1980 [Appendix A], at page one, and *Decision After Reconsideration* [Petitioner's Appendix A] Workers' Compensation Appeals Board, State of California, July 13, 1982). It should be noted that Petitioner offers no California authority contradicting either the opinion of Judge Dove or the Workers' Compensation Appeals Board.

Respondent would respectfully direct the attention of this Court to the summary of the opinions given in *Thomas v. Washington Gas Light Company*, 448 U.S. 261, 65 L. Ed. 2d 757, 100 S. Ct. 2647 (1980), by the Workers' Compensation Appeals Board in its Decision After Reconsideration, at page seven:

> "This is simply another way of saying that in the absence of statutory language to the contrary the remedies are cumulative.
>
> "A review of these opinions then establishes that even though there were separate plurality opinions, there was a consensus on the point that Full Faith and Credit principals do not preclude a workers' copmensation applicant from seeking cumulative remedies in two different states where the litigation in the second state does not involve a relitigation of the specific factual finding made in the first state."

As noted above, California and Alaska differ with regard to the necessity of a finding of "unusual exertion": In Alaska it is a prerequisite to recovery, in California it is not.

Because the requirements of entitlement to California workers' compensation benefits in this instance differ from those of Alaska in this regard, and since the remedies are cumulative, pursuit of California remedies does not necessitate relitigation of factual determinations previously made in Alaska.

Respondent Rose respectfully submits that this case falls squarely within the holding of *Thomas*, and that the California Workers' Compensation Appeals Board may consider his application without violating either the Full Faith and Credit Clause of the United States Constitution, or the principle of *res judicata*.

Respectfully submitted,

THE BOCCARDO LAW FIRM,
JAMES F. BOCCARDO,
Counsel of Record,
EDWARD J. NILAND,
Of Counsel,

Attorneys for Petitioners.

(Appendices follow)

APPENDIX A

JUNE FRED ROSE VS. CHEECHAKO LEASING COMPANY
ALVIN L. DOVE
Workers' Compensation Judge
September 25, 1980 Case No. SJ 52838

OPINION ON DECISION

Applicant, a resident of, and hired in California to work in Alaska, sustained a heart attack during the hours of employment in Alaska on March 29, 1976. He filed Application in California August 11, 1976, and in Alaska September 30, 1976. The latter was by document signed in California September 5, 1976.

Following hearing in Alaska, the Alaska Board found "The Applicant did not suffer from an accident or injury while on the job. *In order to be found compensable the heart attack must be the result of unusual exertion.* Barring such evidence the Board has held in the past that it is of natural causes and not job related. The Board specifically finds that there was no unusual exertion and therefore must deny the claim." See Preliminary Finding of Sept. 6, 1979. Apparently there was no Appeal in Alaska, and the denial was made final by Order of 6 May 1980.

Applicant is now attempting to proceed on his California Application.

Defendant alleges the matter should be dismissed before this California Appeals Board; that the Alaska proceedings are res judicata on the issue of injury, and is entitled to full faith and credit.

Applicant's attorney cites *Kerr vs. Sage Communications*, a panel decision cited in 7 California Workers' Compensation Reporter, Page 141. Undoubtedly, in our present matter, California has great interest in a resident who could possibly need State support in the future, and in fact has been paid substantial California unemployment disability benefits. There is no doubt of the fact jurisdiction would have been accepted if the Alaska case had not been heard and decided earlier, nor is there any question under the authorities, but that if there were a lesser award in Alaska, Applicant could have proceeded in California for higher benefits.

It does also appear, at least on the basis of the reason for the non-compensable finding in Alaska, "no *unusual* exertion," that Alaska's law is much more conservative than is California's.

(The Judge is not finding at this time, but will leave to later the question as to whether the exact finding in Alaska of no *unusual exertion* is binding evidence on such point in California, but only finding California has authority and jurisdiction to hear the matter and determine thereafter if under California law and precedent there is a compensable injury.) See *Thomas vs. Washington Gas Light Co.* decided June 27, 1980 by the U.S. Supreme Court, filed herein by Defendant with its Memorandum in Support of Motion to Dismiss.

The Judge feels it imperative to follow the panel decision above.

ALVIN L. DOVE
Workers' Compensation Judge

ALD:mm

APPENDIX B

ALASKA WORKMEN'S COMPENSATION BOARD
P. O. Box 1149 Juneau, Alaska 99811

J. FRED ROSE, *Applicant,* vs. CHEECHAKO LEASING CO., *Defendant.*	PRELIMINARY FINDING OF DECISION AND ORDER Case No. 76-03-0723

TO: J. Fred Rose, 183 Senter Road, San Jose, CA 95111

Paul Baer, Esq. 501 W. Northern Lights Blvd., Suite 201, Anchorage, AK 99503

Cheechako Leasing Company, 434 Third Street & Grachl, Fairbanks, AK 99701

Glen E. Miller, Esq., Crocker Plaza, Suite 800, 84 W. Santa Clara Street, San Jose, CA 95113

Alan Sherry, Esq., P. O. Box 4-1398, Anchorage, AK 99509

This matter was heard in Anchorage, Alaska on July 25, 1979:

The Board reviewed the evidence and made the following findings of fact.

1. The applicant did not suffer from an accident or injury while on the job. In order to be found compensible the heart attack must be the result of unusual exertion. Barring such evidence the Board has held in the past that it is of natural causes and not job related. The Board specifically finds that there was no unusual exertion and therefore must deny the claim.

DECISION AND ORDER

All claims for compensation are denied and dismissed.

This is not a final decision and is therefore not binding upon the parties or subject to an appeal to the Superior Court. No findings of fact or conclusions of law have been prepared. A formal decision, with findings of fact and conclusions of law will be prepared unless both the claimant and the defendants waive their right to have such a decision issued. Waiver of said right may be exercised by execution of the stipulation found enclosed with this Preliminary Notice of Decision and Order and return of said stipulation to the Board. If stipulations are not filed by both parties within twenty (20) days of the date of the Preliminary Notice of Decision and Order, the Board shall assume that a formal decision is necessary and shall commence preparation of the same. If stipulations are filed by both parties, the Preliminary Notice of Decision and Order shall constitute a final decision of the Board.

Dated at Juneau, Alaska, this 26 day of September, 1979.

ALASKA WORKMEN'S COMPENSATION BOARD

s/Alton Gaskill

Alton Gaskill, Designated Chairman

s/Catherine Rigstad

Catherine Rigstad, Member

s/Jim Robison

Jim Robison, Member

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of J. Fred Rose, applicant vs. Cheechako Leasing Co., defendant and Alaska Pacific Assurance Company, carrier; Case No. 76-03-0723; dated and filed in the office of the Alaska Workmen's Compensation Board at Juneau, Alaska this 27 day of September, 1979.

Dottie Mills

Clerk-Typist